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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 721

SOUTHERN KANSAS GREYHOUND LINES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the United States District Court for the Western District of Missouri, Western Division

STATEMENT AS TO JURISDICTION

JACK R. TURNEY, JR.,
Attorney for Appellant.

Dated February 29, 1956.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT AS TO JURISDICTION

Southern Kansas Greyhound Lines, Inc., appellant, presents this its statement as to the jurisdiction of the Supreme Court of the United States to review the judgment of the United States District Court for the Western District of Missouri, Western Division.

OPINION BELOW

The opinion of the District Court is reported in 134 F. Supp. 502. A copy is appended as Appendix A.

JURISDICTION

The suit below was brought by appellant, under Title 49 U. S. C. Secs. 305(g) and (h) and Title 28 U. S. C. Secs. 1336, 1398, 2284, 2321-2325, and Title 5 U. S. C. Sec. 1009, to set aside an order of the Interstate Commerce Commission (R. Vol I, page 7), entered November 23, 1954, granting a certificate of convenience and necessity to Kansas Trails, Inc. to extend its motor bus operations and an order of the Commission, entered March 21, 1955 denying the petition of the present appellant and others for reconsideration (R. Vol I, page 21).

The judgment of the District Court, dismissing the complaint, was entered October 3, 1955. The notice of appeal was filed December 1, 1955. By order entered January 27, 1956, the District Court extended the time for docketing the case, filing the record on appeal, and filing the jurisdictional statement to and including February 29, 1956.

Jurisdiction to review the decision of the District Court on direct appeal rests on Title 28 U. S. C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED

1. The first question is whether the Court below erred in holding, contrary to the holdings in other Federal District Courts that, in ganting a certificate of public convenience and necessity under the Interstate Commerce Act, authorizing operations duplicating and

paralleling those of protesting motor carriers of passengers, which already are operating at deficits, the Interstate Commerce Commission may, after due request, lawfully fail or refuse to make an express finding or its equivalent as to whether the proposed operation will unduly impair existing service.

2. The report of the Commission failed to state or indicate in its report whether it had actually considered and weighed or was even aware of the undisputed evidence that there is not sufficient traffic available to support the existing service between the points involved, much less the proposed additional duplicative service, and that the proposed operation would seriously impair appellant's service. The second question is whether the Court below erred in holding, contrary to holdings in other Federal District Courts, that it must be presumed, from the ultimate statutory finding, that the Commission considered that evidence and determined that issue.

3. The evidence is undisputed that the authorized Kansas City-Tulsa operation would serve primarily points already served by appellant in its Kansas City-Tulsa service, including all of the principal traffic points; that the applicant before the Commission proposes to add an additional amount of service equal to 40% of the service now rendered by appellant between those points; that traffic between the common points has declined drastically in recent years and at the time of the hearing was less than 50% of what it had been six years before; that appellant's operations between the common points, which constitute virtually its entire operation, had operated at a deficit for a year or more prior to the hearing; that appellant had been forced by declining traffic to reduce service along the

routes and between the points involved and that any further diversion or loss of traffic by appellant would necessitate further impairment of its service; that a substantial diversion of appellant's traffic between the common points would be inevitable from the institution of the proposed duplicative operation, and that, according to official records required by law to be maintained, the buses of appellant had been operated between the common points at averages of less than 40% of capacity during the year preceding the hearing.

The third question is whether, in the light of the record as a whole, including these undisputed facts, the District Court erred in holding that testimony of occasional crowding on buses leaving a single point, more than a year prior to the hearing, plus testimony speculating that the proposed operation would attract an unspecified amount of additional traffic, constitutes sufficiently substantial evidence that there would be no impairment of existing service to sustain an order of the Commission authorizing an additional and competitive operation between the points served by appellant.

4. The fourth question is whether the District Court erred in holding that there were sufficiently substantial evidence, adequate findings, and ample jurisdiction for the Commission to grant authority, under Title 49, Sec. 307(a), for Kansas Trails to carry passengers traveling from Kansas City to Tulsa, or from Tulsa to Kansas City, where there was (a) no evidence of need for additional service for such passengers and (b) no finding that the public convenience and necessity require additional service for such passengers.

STATUTES INVOLVED

The principal statute involved is Section 207(a) of the Interstate Commerce Act (Title 49 USC Sec. 307(a)), the pertinent portion of which provides:

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *"

The second statute involved is Section 10(e) of the Administrative Procedure Act (Title 5 USC Sec. 1009(e)), which provides:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case

subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

STATEMENT OF THE CASE

The case below arose out of an application before the Interstate Commerce Commission by Kansas Trails, Inc., which operates, among other places, between Kansas City, Missouri and Osawatomie, Kansas, to extend its operations an additional 202 miles from Osawatomie into Tulsa, Oklahoma, in order that it might provide through-bus operation between Kansas City and Tulsa, serving intermediate points. Of the 202 miles, 180 miles, *i.e.*, from Garnett to Tulsa duplicates the routes of existing carriers, which protested the application. The Garnett-Coffeyville segment (96 miles) duplicates the route used by appellant in its Kansas City-Tulsa operations. The Coffeyville-Tulsa segment (76 miles) parallels appellant's Kansas City-Tulsa operations via Coffeyville and duplicates the Coffeyville-Tulsa route of the other plaintiff below, Missouri Kansas and Oklahoma Coach Lines, Inc.

Based upon public testimony to the effect that from certain intermediate points the existing *two-line* services were inconvenient, the Commission found a need for *single-line* service between points on Kansas Trails'

present and proposed routes which do not now have such service.

Appellant provides *single-line* service between Kansas City and Tulsa via a route which the proposed route duplicates in part and parallels in part, serving all important intermediate cities. The evidence was undisputed that the existing service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City is adequate, and the Commission made no finding of inadequacy of service for such passengers.

The evidence was undisputed that traffic on appellant's Kansas City-Tulsa service had been rapidly declining for some years, that appellant had been forced to reduce its service because of inadequacy of traffic, that its entire operation had been conducted at a deficit for the year preceding the hearing, and that the portion between Garnett and Tulsa had been operated at a deficit for the two years prior to the hearing.[1]

The protestants, including appellant urged the Commission to weigh and consider the extensive undisputed evidence showing that the proposed operation, which was designed primarily for the Kansas City-Tulsa traffic, could not fail to impair the existing service between those cities which it would duplicate and

[1] The Court below erroneously concluded that the unsupported observation of one witness that at times, more than a year prior to the hearing, he had observed crowded conditions on several of appellant's buses leaving a single intermediate point, together with the speculation of other witnesses that new traffic would be developed from the new points to be served, constituted substantial evidence to rebut the statistical records which appellant is required by law to maintain. The invalidity of that conclusion is discussed hereinafter.

parallel, particularly the deficit service of appellant. They requested the Commission to find that it would impair that service, and, in accordance with the uniform holdings in many other cases to the effect that non-impairment of existing service is an essential prerequisite to a finding of public convenience and necessity, to deny the application.

The report of the Commission mentions the contention that the proposed operation would result in impairment of existing service (R. Vol. I, Page 16) but neither makes a finding thereon, mentions the evidence relating to that contention, nor otherwise indicates that it weighed, considered, or determined that question.

Appellant and Missouri Kansas & Oklahoma Coach Lines, Inc. brought the action below on the grounds, so far as are pertinent here, that the Commission's order was invalid in that it (a) failed to contain a finding with respect to the crucial and basic question whether existing service would be impaired, (b) failed to indicate that the Commission had actually considered and weighed or was even aware of the undisputed evidence tending to show that impairment would necessarily result, (c) was not supported by substantial evidence to show that such impairment would not result, and (d) violated the express limitations of Title 49, Sec. 307(a) in granting authority to provide service in excess of the service with respect to which there was evidence of public convenience and necessity.

The Court below dismissed the complaint, holding, among other things, that: (a) the Commission need not make a finding with respect to impairment of existing service, but need only make the ultimate statu-

tory finding, (b) the Commission need not indicate affirmatively that it had considered or determined the question of impairment, since the Court was bound to assume that it had weighed and considered it, (c) there was substantial evidence of non-impairment, conclusive upon the Court, and (d) the evidence and finding of need for single-line service to and from intermediate points were sufficient to validate the order permitting service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City.

QUESTIONS SUBSTANTIAL

One of the most important sections of the Interstate Commerce Act is Title 49 U. S. C. Sec. 307(a), which gives the Interstate Commerce Commission jurisdiction to issue certificates of convenience and necessity authorizing new motor carrier operations. The Commission and the Courts have held uniformly that an essential issue and element in the definition of public convenience and necessity is that the new proposed service can be operated without endangering or impairing the operations of existing carriers.

In the United States District Court for the District of Columbia,[1] in the United States District Court for New Jersey,[2] and in the United States District Court for the Eastern District of Missouri,[3] the law is that it is essential to the granting of such authority that

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[1] See *Clarke* vs. *United States*, U. S. D. C. D. C. (1951) 101 F. Supp. 587.

[2] *Hudson Transit Lines* v. *United States*, U. S. D. C. N. J. (1948) 82 F. Supp. 153, affirmed (1949) 338 U. S. 802.

[3] *L. A. Tucker Truck Lines* v. *United States* (1953), U. S. D. C. E. D. Mo., 115 F. Supp. 647.

there be both substantial evidence and *an express finding* that a proposed authorized route will not impair existing service.

In the cause below, the United States District Court for the Western District of Missouri has held directly to the contrary. On a matter of such nationwide importance as the conditions precedent to the issuance of a certificate of public convenience and necessity under the Interstate Commerce Act, there should be absolute uniformity among the various Federal Courts. This can only be achieved by an express determination on the issue by this Court, preferably following plenary consideration, including briefs on the merits and oral argument.

Secondly, the Court below, although apparently conceding that decisions of this Court clearly establish that the Commission must weigh and consider the disadvantage to the public of an undue impairment of the service of existing carriers, construes language of this Court in other decisions as requiring reviewing Courts to *presume* from the ultimate statutory finding that the Commission weighed and considered evidence relating to that issue, even in the absence of an indication by the agency that it did so. If this ruling be correct, judicial review of agency action becomes a mere formality, agencies are free to make arbitrary determinations without regard to the really crucial issues, and to base their decisions on one-sided and relatively insignificant sub-issues, and the Courts are powerless to do anything about it. Affirmation by this Court would aggravate the destructive effect of the opinion below upon the law pertaining to judicial review, because that decision is based upon interpretation of language of this Court.

ARGUMENT

The District Court Erred in Holding That No Finding Upon the Question of Impairment of Existing Service Was Necessary

Title 49 U. S. C. Sec. 307(a) lists only the *ultimate* findings which must be made in order to give the Commission the jurisdiction to issue a certificate. One of these is that the "public convenience and necessity" require the operations authorized, and the other that the applicant is fit, willing and able to perform them.

The *definition* of "public convenience and necessity," uniformly accepted by the Commission and the Courts, includes the requirement that the proposed new operation or service can be conducted "without endangering or impairing the operations of existing carriers contrary to the public interest."

> *Interstate Commerce Commission* v. *Parker* (1944), 326 U. S. 60, 72 (Footnote 7);
>
> See also *American Trucking Associations, Inc.* v. *United States* (1944), 326 U. S. 77, 86.

The District Court concedes, in deference to the latter cases, that the Interstate Commerce Commission must, in determining applications under Section 307(a), consider and weigh the disadvantage to the public of undue impairment of existing service, but holds that no finding upon these matters is necessary.

The Court draws too fine a line. In the first place, it overlooks the fact that this Court, in the *Parker* case expressly declared (at pages 69-70):

> "*Since,* however, on adequate evidence the Commission *found* that the motor service sought was of a different character from the existing motor service and not directly competitive *or unduly*

prejudicial to the already certificated motor carriers, 42 M. C. C. (F) 725, 726, *we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."* (Emphasis supplied.)

Second, the primary objective of the instant application was for authority to compete for precisely the same traffic as that carried by existing carriers, which already were operating at deficits and had been forced to reduce service as a result of an insufficient volume of traffic. There was never even any attempt to rebut or refute the evidence showing that there would be diversion and that the existing service would be impaired. Under such circumstances, the competitive effect of the proposed operation was the most important and basic issue, the determination of which was a prerequisite to a finding of public convenience and necessity. Since there was not enough available traffic to support the proposed new service in addition to the existing service, authorization of another carrier clearly would be contrary to the public interest.

> *Texas and Pacific Railway Co.* vs. *Gulf, Colorado & Santa Fe Railway Co.* (1926), 270 U. S. 266, 277.

Since the question of impairment is a basic issue, its determination must be clearly ascertainable from express findings or their equivalent, and cannot be supplied by inference or implication from the statutory conclusions.

> *Atchison, Topeka & Santa Fe Railroad Company* v. *United States* (1934), 295 U. S. 193;
>
> *Florida* v. *United States* (1930), 282 U. S. 194;

United States v. *Pierce Auto Freight Lines* (1945), 327 U. S. 515, 533.

For the foregoing reasons, among others, the District Courts for the District of Columbia,[1] New Jersey,[2] and the Eastern District of Missouri[3] each reversed grants of authority by the Commission upon the ground that it had failed to make an express finding of fact on the basic issue of impairment of service.

The Court below bases its conclusion to the contrary chiefly upon a construction of *United States* v. *Pierce Auto Freight Lines, supra,* as holding that the Commission need only make the *ultimate* findings of public convenience and necessity and fitness, named in the statute, and that the Court must assume that the Commission considered and determined all of the necessary subordinate questions. That interpretation is erroneous. In the first place, the opinion of this Court in the *Pierce* case, at page 533, expressly declared that a finding in the statutory language would *not* be sufficient in the case of the *other* required ultimate finding,—*viz.*, the fitness of the applicant.

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[1] *Clarke* vs. *United States* (1951), U. S. D. C. 101 F. Supp. 587.

[2] *Hudson Transit Lines* vs. *United States* (1948), U. S. D. C. N. J. 82 F. Supp. 153, 157, affirmed 338 U. S. 802. The District Court in the present case misconstrues the cited decision, apparently overlooking the following language: "The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service *without being unduly prejudicial to the existing service. Interstate Commerce Commission* vs. *Parker, supra. No such finding has here been made,* nor is there any evidence to support a finding." (Emphasis supplied.)

[3] *L. A. Tucker Truck Lines* v. *United States* (1953), U. S. D. C. Ed. Mo., 115 F. Supp. 647, 649, quoting verbatim the finding in the *Hudson Transit* case, quoted in the preceding footnote.

In the second place, the construction overlooks the fact that the issue before the Supreme Court in the *Pierce* case was not whether the Commission had failed to make clear its determination of the competitive effect of *either* of the two applications before it, but whether it had made clear its determination of the competitive effect of *both* of the approved applications. In that case, the Commission had held expressly that one of the issues was whether the new service could be conducted "without endangering or impairing the operations of existing carriers contrary to the public interest", and had discussed at length the evidence showing that the two applicants already transported the bulk of the traffic involved, that the traffic in the area was steadily increasing, that for a large amount of the traffic there was no carrier service available, that the lone authorized competitive carrier had not instituted daily service until after the filing of the applications, and that in general the service of the protesting carriers between the points involved was negligible. Read in its proper context, the decision in the *Pierce* case does not determine the point here in issue, but holds that where the Commission clearly determined, as it there did, the competitive effect of each of the two applications, that determination necessarily and inescapably included the determination of the competitive effect of both applications.

In the instant case there is no indication that the Commission made any determination as to the competitive effect of the operation which it authorized, despite its substantial duplication of existing services which were already on the brink of impairment for lack of traffic.

The second case relied upon in the Court below is *Alabama Great Southern R. Co.* v. *United States*

(1950), 340 U. S. 216. The very portion of that decision quoted in the opinion below expressly declares that the Commission is not relieved of the duty to make the basic findings of fact, and that what constitute basic findings varies with the context of the situation presented. The Court also expressly found that the Commission had adjudged (a) that the authorized differentials in that case would be compensatory, (b) that competition between rail-barge service and all-rail service was worth preserving, (c) that such competition would not be preserved unless the differentials were prescribed and the losses of traffic curtailed, and (d) other factors. Those findings, supporting the ultimate statutory findings, were deemed by the Court to be adequate. That decision merely stands for the proposition that differentials between all rail rates and rail-barge rates may be based upon factors other than differences in costs. It has no bearing upon the issue here, which is whether the Commission and Courts have been correct in their many declarations that non-impairment of existing service is a necessary basic issue in determining public convenience and necessity for the authorization of operations duplicating existing operations which are unable to withstand any of the inevitable diversion of traffic.

The District Court Erred in Holding That the Reviewing Court Must Presume That the Commission Considered and Weighed the Evidence Relating to the Issue of Existing Service Despite the Absence of Any Indication That It Did So.

The report of the Commission, although mentioning that appellant and others opposed the application on the ground that it would impair existing service, makes no mention of the evidence relating to that issue, nor indicates in any way that it had considered it or deter-

mined it. Its entire discussion of the evidence and the issues was confined to other matters.

Having conceded, following the *American Trucking Associations, Inc.* and *Parker* cases, *supra,* that impairment of existing service is an essential issue which must be weighed and considered, the decision of the District Court nullifies that principle by holding that "the Commission could not have been oblivious to the competitive consequences of its order upon the plaintiffs or upon the public interest". The effect of that ruling is to eliminate from the decisions of this Court in the *American Trucking* and *Parker* cases, the requirement that the Commission *"consider* and *weigh"* the issue of impairment, and to confine those decisions to the requirement of *"hearing"* evidence upon that issue.

Again the Court below bases this ruling upon the *Pierce Auto Freight Lines* case, *supra.* As mentioned before, the Commission's report in that case discussed at length and indicated beyond question its determination that neither of the authorities granted would unduly impair existing service, and the Supreme Court itself ruled that in making these separately stated determinations the Commission clearly had not been oblivious of the competitive consequences, which it had discussed at length. Under such circumstances the Court quite properly refused to sustain a technical presumption that the Commission had not considered the issue. That is a far cry from ruling, as did the Court below here, that the Commission need not give any indication in its report of awareness of, or consideration or weighing of the evidence relating to the competitive effect.

The purpose of judicial review, in the final analysis, is to insure that the Commission weigh and consider and act upon the evidence relating to the basic issues which must determine the ultimate findings. Where, as here, the Commission gives no indication of having "weighed and considered," much less of having made a determination upon, the basic issue of impairment of existing service, the Court has no way of knowing whether the Commission actually weighed that evidence. To rule, as did the Court below, that the Commission's report need not show on its face that such issues were considered and determined, is, as a practical matter, to render judicial review a nullity, and to reduce the function of the reviewing court to merely giving rubber-stamp approval, based upon conclusive presumption that the Commission had fulfilled the requirement.

The District Court Erred in Holding That There Was Substantial Evidence That Impairment of Existing Service Would Not Result from the Authority Granted

In determining whether substantial evidence exists in the record, a reviewing court must review the whole record and take into account whatever in the record fairly detracts from the weight of the evidence.

> *Administrative Procedure Act,* Sec. 10(e), Title 5, U. S. C. Sec. 1009 (e);
>
> *Universal Camera Corporation* v. *National Labor Relations Board* (1951), 340 U. S. 474.

The evidence in this case is undisputed that:

1. Kansas Trails proposes to operate through-bus Kansas City-Tulsa service, serving the following points *which are also served by appellant in its Kansas City-*

Tulsa operations: Kansas City, Garnett, Welda, Colony, Iola, Humboldt, Chanute, Earlton, Thayer, Morehead, Cherryvale, Coffeyville, Collinsville and Tulsa; it proposes an additional amount of service equal to 40% of the service now rendered by appellant between those points;

2. The Kansas Trails' service also will include service to the following points which are now served by Missouri, Kansas & Oklahoma Coach Lines in conjunction with a portion of appellant's service between Kansas City and Tulsa: South Coffeyville, Lenapah, Delaware, Nowata, Watova, Talala, Oolagah, and Owasso;

3. The only proposed new points not served by appellant, either directly or in conjunction with Missouri, Kansas & Oklahoma Coach Lines, are the relatively small points of Olathe, Springhill, Hillsdale, Paola, Osawatomie, and Greeley, Kansas;

4. Traffic between the points where Kansas Trails proposes a new additional competition has declined steadily for some years, and at the time of the hearing was less than 50% of what it had been six years before;

5. Appellant's operations between the involved points, which constitute virtually its entire operation, had operated at a deficit for a year or more prior to the hearing, according to official records and reports required by law to be maintained;

6. According to official records, required by law to be maintained, the buses of both appellant and Missouri, Kansas & Oklahoma Coach Lines had operated over the routes and between the points involved at *averages* of less than 40% of capacity during the year preceding the hearing;

7. Both appellant and Missouri, Kansas & Oklahoma Coach Lines had been forced by declining traffic to reduce service along the routes and between the points involved;

8. Any further diversion or loss of traffic by appellant would necessitate further impairment of its service;

9. A substantial diversion of appellant's traffic between the common points would be inevitable from the institution of the proposed duplicative operation.

In the face of the foregoing evidence, the Court below held that testimony of a passenger-witness that on isolated trips taken by him, more than a year prior to the hearing, between Coffeyville and Tulsa, appellant's buses were crowded, plus unsupported opinions or guesses that the proposed new operation would create an unspecified amount of additional traffic, constituted substantial evidence that the proposed operation would not produce such diversion of traffic as would impair the existing service, and was conclusive upon the Court. Appellant submits that that ruling renders the requirement of *substantial* evidence a nullity and constitutes precisely the type of ruling condemned by this Court in the *Universal Camera* case, *supra.*

The District Court Erred in Holding That There Were Substantial Evidence and Adequate Finding to Authorize Service for Tulsa-Kansas City Passengers

Title 49 U. S. C. Sec. 307(a) expressly limits the Commission's jurisdiction to granting certificates to *"the extent"* to which the proposed service is required by the public convenience and necessity.

The principal purpose of the application before the Commission was to provide through-bus service be-

tween Kansas City and Tulsa, and the Commission so found. The evidence was undisputed that passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City would be the principal traffic affected. The evidence was likewise undisputed that existing service for such passengers was entirely adequate and there was no criticism whatsoever of that service. The evidence was undisputed that appellant provides single-line through-bus service between those two cities, the adequacy of which was never questioned. The Commission's report itself expressly limited its finding of need to points between which single-line service was not available. In short, there was neither evidence nor finding that the public convenience and necessity require the authorized service for Kansas City-Tulsa passengers.

In the premises, the Commission had no jurisdiction under Section 307(a) to authorize service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City, and the Court below erred in holding that there were adequate findings and substantial evidence to support the grant of authority to provide service for such passengers.

CONCLUSION

Under the principles announced in the District Court, judicial review becomes an impotent mechanical process, in which the Court merely looks to see whether the agency has made the *ultimate* findings of fact required by the statute, and if so, is powerless to proceed further. Although the District Court appears to concede that the issue of impairment of existing service is a basic issue which must be "weighed and considered" by the Commission, in determining whether

public convenience and necessity require a proposed operation, and that a proposed operation which would unduly impair existing service cannot be approved by the Commission, it nullifies both of those requirements by holding that the agency need not either (a) make a finding upon those basic issues, or (b) indicate that it was aware of the evidence relating to, had weighed and considered the evidence relating to, or had determined those issues. According to its ruling, once the Commission makes the ultimate finding of fact specified in the statute, the Court is bound to presume, that the Commission weighed, considered and determined the basic issues, even though the report of the Commission does not indicate that it did so.

The District Court reached this result through what is believed to be misapplication of pronouncements of this Court, particularly those appearing in the *Pierce Auto* case. The latter case is clearly distinguishable from the present case, in that it involved a Commission report which showed on its face that it had carefully weighed and considered this precise basic issue, and had declared, in connection with the *other* ultimate finding required by the same statutory section, that the *ultimate* finding, without findings upon the underlying basic issues, is *not* sufficient.

The decision of the District Court admittedly is contrary to the decision of at least one other District Court upon the identical question relating to the same statutory provision. Appellant believes it also to be contrary to decisions upon the same question by other District Courts. Only action by this Court can achieve nationwide uniformity in the law governing judicial review of Commission determinations under

this important section of the Interstate Commerce Act.

Of lesser national importance, but of great local importance from the standpoint of preservation of existing services between Kansas City and Tulsa, are the errors of the District Court in concluding that there was substantial evidence that the proposed operation would not unduly impair existing service and in finding that there was substantial evidence and adequate finding of a need of the proposed competitive service for passengers traveling from Kansas City to Tulsa, and from Tulsa to Kansas City.

The matters here in issue appear to be sufficiently important to warrant this Court in hearing oral argument and accepting briefs on the merits and ultimately reversing the District Court.

Respectfully submitted,

JACK R. TURNEY, JR.,
Attorney for Appellant.

Dated February 29, 1956.

Proof of Service

I, Jack R. Turney, Jr., attorney for Southern Kansas Greyhound Lines, Inc., appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of February 1956, I served copies of the foregoing Statement as to Jurisdiction on the several parties, as follows:

On the United States, by mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Kansas Trails, Inc., intervening defendant, by mailing copies in duly addressed envelopes with Air Mail postage prepaid to its attorneys of record as follows: J. William Townsend, Esquire, 204 Central Building, Topeka, Kansas; Oliver D. Rinehart, Esquire, Potts Building, Paola, Kansas; and John McCall, Esquire, Chanute, Kansas.

JACK R. TURNEY, JR.,

APPENDIX

APPENDIX

APPENDIX A

SOUTHERN KANSAS GREYHOUND LINES, INC., and MISSOURI, KANSAS & OKLAHOMA COACH LINES, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*, and

KANSAS TRAILS, INC., *Intervening Defendant*.

No. 9695.

United States District Court
W. D. Missouri, W. D.

Oct. 3, 1955.

Action to enjoin and vacate orders of Interstate Commerce Commission issuing certificate of convenience and necessity to bus line. The three-judge District Court, Whittaker, J., held that Commission, in determining to grant certificate of public convenience and necessity to passenger carrier, was not required to make finding of fact as to effect of grant of certificate upon existing carriers.

Complaint dismissed.

* * * * * * * * * * *

Before COLLET, Circuit Judge, and RIDGE and WHITTAKER, District Judges.

WHITTAKER, District Judge.

This is an action brought under Section 305(g) and (h), Title 49, U.S.C.A., and Sections 1336, 1398, 2284, 2321-2325, Title 28, U.S.C. and Section 1009, Title 5, U.S.C.A., to enjoin and to vacate an order of the Interstate Commerce Commission of November 23, 1954, granting a certificate of convenience and necessity to Kansas Trails, Inc., to extend its motor bus service from Osawatomie, Kansas, to Tulsa, Oklahoma, over U. S. Highway 169, serving all intermediate points, and an order of the Commission of

March 21, 1955, denying protestants' (plaintiffs') petition for reconsideration.

The background facts, so far as essential to understanding of the questions presented, are that Kansas Trails, Inc., hereafter called "Trails", held Commission certificates authorizing it to conduct motor bus operations over U. S. Highway 169 from (1) Kansas City, Missouri to Osawatomie, Kansas (a distance of 55 miles), (2) from Iola to Chanute, Kansas (a distance of 18 miles), (3) from the north intersection with U. S. Highway 160, about 3 miles south of Moorhead, to the south intersection with U. S. Highway 160, 3 miles south of Cherryvale, Kansas (a distance of 9 miles), and (5) from Coffeyville, Kansas to Oolagah, Oklahoma, a distance of 45 miles (its present line running from Oolagah southeasterly over Oklahoma State Highway 58, a distance of 14 miles, to, and terminating at, Claremore, Oklahoma—thus not running into or out of Tulsa). This left "gaps" in Trails' bus service on U. S. Highway 169 extending between (1) Osawatomie and Iola, Kansas (a distance of 51 miles), (2) Chanute and the north intersection with U. S. Highway 160, 3 miles south of Moorh ad, Kansas (a distance of 28 miles), (3) the point of the south intersection with U. S. Highway 160, 3 miles south of Cherryvale, and Coffeyville, Kansas (a distance of 13 miles), and (4) Oolagah and Tulsa, Oklahoma (a distance of approximately 32 miles).

For the purpose of closing these "gaps" in its bus service from Osawatomie, Kansas, southerly over U. S. Highway 169, and to enter and serve Tulsa, Oklahoma, as its southern terminal, so that it might operate direct, single-line, through, bus service between Kansas City, Missouri and Tulsa, Oklahoma, Trails filed its application with the Commission, under Section 207 of the Interstate Commerce Act, 49 U.S.C.A. § 307, asking a certificate of public convenience and necessity to operate as a common carrier by motor vehicle, of passengers, baggage and express, between Osa-

watomie, Kansas, and Tulsa, Oklahoma, over U. S. Highway 169, serving all intermediate points.

Southern Kansas Greyhound Lines, Inc., hereafter called "Southern", holding and using, among others, Commission certificates authorizing bus service from Kansas City, Missouri, over U. S. Highways 40 and 24, to Lawrence, Kansas, and thence south, over U. S. Highway 59, to its junction with U. S. Highway 169 at Garnett, Kansas, and thence south, over U. S. Highways 59 and 169, to Chanute, thence south over U. S. Highway 169 to Coffeyville, Kansas, and thence west, over U. S. Highway 166 to its intersection with U. S. Highway 75, and thence south, thereover, to Tulsa; and, Missouri, Kansas & Oklahoma Coach Lines, hereafter called "MK&O", holding and using, among others, Commission certificates authorizing bus service from Coffeyville, Kansas, over U. S. Highway 169, to Tulsa, Oklahoma, each protested Trails' application, contending, among other things, that the proposed new service would duplicate Southern's service from Garnett, Kansas, over U. S. Highway 169, to Coffeyville, Kansas, and would duplicate MK&O's service from Coffeyville, Kansas, over U. S. Highway 169, to Tulsa, which service was adequate, and that, to succeed, Trails' proposed new service would have to divert a substantial amount of their traffic between these duplicative points, and, particularly, between the termini of Tulsa and Kansas City, and that their operations between these points were, and for some years had been, unprofitable, and that any such diversion of traffic would unduly prejudice them and threaten impairment of their existing, adequate but unprofitable, service between these points, and that, therefore, the proposed new service was unneeded, and would not serve public convenience and necessity; and that Trails was not "fit" or "able" to perform the proposed new service.

Extensive hearings were held upon the application before a joint board, constituted pursuant to Section 305(a), Title

49, U.S.C.A., in October and December, 1953, producing a record of 1,073 pages and numerous exhibits. After consideration, on June 7, 1954, the joint board served its recommended report and order, finding a "definite need" for "direct, single-line service" over Highway 169, between Kansas City, Missouri and Tulsa, Oklahoma, serving all intermediate points, and that "the present and future public convenience and necessity require operation by applicant as a common carrier * * * of passengers and their baggage, and of express in the same vehicle with passengers, between Osawatomie, Kansas, and Tulsa, Oklahoma, over U. S. Highway 169 * * * serving all intermediate points" and "that applicant is fit, willing and able properly to perform such service * * *."

Plaintiffs, and others, filed exceptions with the Commission to the joint board's recommended report and order, and Trails filed a reply thereto.

Thereafter, on November 23, 1954, Division 5 of the Commission issued its report and order granting Trails' application. That report (a) recited the background facts, and the antecedent steps taken in the proceeding, (b) stated the objective of the application (for direct, single-line, through bus service on highway 169 from Kansas City to Tulsa, and the reverse, serving all intermediate points), and pointed to and discussed the evidence adduced by Trails to show the need for this service,[1] (c) discussed the

1. Consisting, chiefly, of testimony of witnesses residing at Olathe, Spring Hill, Paola and Osawatomie, Kansas, that they were without bus service southerly from Osawatomie on Highway 169, save for a tri-weekly bus operating from Osawatomie to Garnett, which service required a transfer at Garnett, to Southern's busses, to go south on highway 169 to any point intermediate to, or to, Coffeyville, Kansas, and (unless the destination were Tulsa—which could be reached by staying on Southern's bus which traveled thereto over other highways) there to transfer to an MK&O bus to go south on highway 169 to any point intermediate to, or to, Tulsa, Oklahoma, and, of course, entailing

evidence as to financial condition, fitness and ability of Trails to render the proposed service,[2] and (d) pointed out that plaintiffs "opposed the application of Trails because they believe that the points involved are now being furnished with all of the service that available traffic will support; that this service is being maintained on a high standard; that it is being operated on a close margin and cannot stand a diversion of revenue without deterioration in the standards of service; and that the placing in operation of another carrier between Tulsa and Kansas City will result in a competitive situation destructive to them, to the ultimate disadvantage of both the existing carriers and the public," and that there are presently 22 bus schedules and 4 railroad schedules between Kansas City and Tulsa, and (e) pointed out that plaintiffs contended "that the joint board erred in finding (1) that the service recom-

similar transfers on the returning of northbound journey, resulting in inconvenience and delay of passengers, and their baggage, and in costly delay of small freight shipments, particularly urgently needed repair parts, tools, oil well drilling cores and the like, and testimony of witnesses from Tulsa, Nowata, and South Coffeyville, Oklahoma, showing the necessity for like transfers, and incident inconvenience and delays, of passenger and freight traffic moving north from these Oklahoma points, over highway 169, to points north of Coffeyville, Kansas, particularly to Greeley, Osawatomie, Paola, Spring Hill and Olathe, Kansas, and testimony of witnesses from Coffeyville, Chanute, and Iola, Kansas, showing the need for like transfers and the incident inconvenience and delays of traffic moving south to Oklahoma points on highway 169 south of Coffeyville, Kansas, and moving north on highway 169 to points north of Garnett, Kansas.

2. The evidence being that Trails has been operating at a loss for several years, has an accumulated operating deficit of $134,290.00, and its current liabilities exceed its current assets by about $6,000.00, but has assets of the book value of $496,724.38, and that Crescent Oil, Inc., the controlling stockholder of Trails, and R. J. Johnson and others who own the stock of Crescent Oil, Inc., have guaranteed payment of all past and future obligations of Trails; and that Trails has the needed additional new bus equipment on order.

mended is required by the public convenience and necessity, and (2) in finding that Trails is fit and able to render the service recommended", and, in addition, that Southern contended "that the joint board erred in failing to find that existing service is satisfactory", and (f) the Commission then found "that persons residing in many communities along U. S. Highway 169 between Tulsa and Kansas City are not now receiving adequate service", and that the territory involved "is much too populous to be adequately accommodated by two and three line service", and that the granting of Trails' application "would result in direct, single-line service between all points on U. S. Highway 169 between Tulsa and Kansas City", and that Trails had "met the burden" of establishing that public convenience and necessity require its proposed service. The Commission then found that Trails' "weakened financial condition" had been brought about by its present disconnected "uneconomical and impractical operation", and that the granting of its application would "undoubtedly strengthen its financial position". The Commission concluded with the ultimate finding "that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers and their baggage and of express in the same vehicle with passengers, between Osawatomie, Kansas, and Tulsa, Oklahoma, over U. S. Highway 169, through Garnett, Iola, Chanute, Cherryvale, and Coffeyville, Kansas, and South Coffeyville, Delaware, Colaggahm, and Owasso, Oklahoma, serving all intermediate points; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a certificate authorizing such operation should be granted." Order accordingly was entered November 23, 1954.

Plaintiffs timely filed, on January 24, 1955, a petition for reconsideration by the whole Commission, and, thereafter,

on March 21, 1955, the Commission denied that petition for the stated reasons "that (1) the evidence adequately supports the findings of Division 5, and (2) valid grounds for reconsideration have not been shown."

Thereafter, on March 31, 1955, plaintiffs filed this action to enjoin and to vacate said orders of the Commission, and the parties were fully heard by us on September 8, 1955, and the cause was submitted upon the Commission's record and the pleadings and briefs of the parties.

There being no question here of constitutional or statutory power of the Commission to render the challenged orders, our function, on this review, is strictly limited to a determination of whether the Commission's orders are based upon adequate findings and whether they, in turn, are supported by substantial evidence, Interstate Commerce Commission v. Union Pacific R. Co., 222 U.S. 541, 32 S.Ct. 108, 56 L.Ed. 308, because as said by Judge Parker in Carolina Scenic Coach Lines v. United States, D.C., 56 F. Supp. 801, 803, "[w]hat public convenience and necessity require in the premises is a matter which Congress has confided to the judgment of the Commission, and not to the Courts, to determine", compare Chesapeake & O. R. Co. v. United States, 283 U.S. 35, 51 S.Ct. 337, 75 L.Ed. 824; Board of Trade of Kansas City, Mo. v. United States, 314 U.S. 534, 62 S.Ct. 366, 86 L.Ed. 432; United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971, and, hence, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-287, 54 S.Ct. 692, 694, 78 L.Ed. 1260; Rochester Telephone Corp. v. United States, 307 U.S. 125, 146, 59 S.Ct. 754, 83 L.Ed. 1147. With these limitations in mind, we proceed to a consideration of the points urged by the plaintiffs.

Plaintiffs' first point is that, though the Commission's report took notice of their contentions that they are operating on such a close margin that they cannot stand any diversion of traffic without deterioration in the standards of their service, and that the proposed new service by Trails would result in a competitive situation destructive to them and their service, it did not make a specific subordinate finding upon that issue, as they claim the law requires, but made only the ultimate finding that the proposed service "is or will be required by the present or future public convenience and necessity", and that, therefore, the findings are not sufficient to support the orders. They rely chiefly upon the cases of Pan-American Bus Lines Operation, 1 M.C.C. 190, 203;[3] Clarke v. United States, D.C.D.C., 101 F.Supp. 587; Interstate Commerce Commission v. Parker, 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051, and American Trucking Associations, Inc., v. United States, 326 U.S. 77, 65 S.Ct. 1499, 89 L.Ed. 2065.

It must be admitted that the Clarke case [101 F.Supp. 590] holds that the Commission must "make definite findings of fact as to the effect [upon existing carriers] of the grant of this certificate", of convenience and necessity, and that the ultimate finding, required by the statute, Section 307, Title 49, U.S.C.A., that the new service "is or will be required by the present or future public convenience and necessity" is not enough. But that case is out of harmony with every other case which we have been able to find upon the precise point here considered. We think the quoted statement from that case fails to distinguish between what

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3. Holding that in determining public convenience and necessity the Commission must consider "whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

the Commission must *hear and consider* and what it must *specifically find in its report.* The Clarke case relies upon the Parker and American Trucking cases, yet neither of them support it on this point, nor plaintiffs' position here. While those cases each hold that the Commission "must weigh the needs of the [applicant] against disadvantages to the [existing carriers] to find the balance of public convenience and necessity in determining whether to grant" the application (326 U.S. at page 68, 65 S.Ct. at page 1494 of the Parker case and 326 U.S. at page 86, 65 S.Ct. at page 1503 of the American Trucking case), neither of them say, as does the Clarke case, that the Commission must "make definite findings of fact as to the effect [upon existing carriers] of the grant of this certificate."

Plaintiffs also rely upon Hudson Transit Lines v. United States, D.C.S.D.N.Y., 82 F.Supp. 153, 157; L. A. Tucker Truck Lines v. United States, D.C.E.D.Mo., 115 F.Supp. 647, 649, and Luckenbach Steamship Co. v. United States, D.C.S.D.N.Y., 122 F.Supp. 824, 827. The Hudson Transit and Tucker Truck Line cases hold, on the point here considered, only that the *evidence* must show that present facilities are inadequate and that public necessity and convenience require the new service and, hence, they do not support the plaintiffs' position here. In the Luckenbach case a similar issue was involved, and the Commission had not made a specific subordinate finding as to the effect of the proposed new service upon existing carriers but had made, as here, only the ultimate finding that public convenience and necessity required the new service, and it was claimed upon the judicial review that the Commission had "failed to consider the detrimental effect the granting of the certificate would have on existing carriers." The Court pointed out that this was a material issue and that failure of the Commission "to consider it" has been held ground for reversal of its order, citing the Clarke case, but the Court held that "Under Section 14(1) of the Interstate Commerce Act, 49 U.S.C.A. § 14(1), the Commission is

not required to make detailed findings of fact except in a case where damages are involved. Manufacturers' R. Co. v. United States, 246 U.S. 457, 489-490, 38 S.Ct. 383, 62 L.Ed. 831. The ultimate findings required by law are only that the applicant is fit, willing and able to perform the proposed service and that the service will serve the public convenience and necessity, 49 U.S.C.A. § 909(c). Such findings were made here." We pause to point out that the provisions of Section 909(c), Title 49, U.S.C.A., relative to water carriers, are precisely like the provisions of Section 307, Title 49, U.S.C.A. relative to motor carriers. The Court concluded "It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function." This case, it seems to us, does not support the plaintiff, but is a clear and positive authority against their contention.

But, at all events, the Supreme Court has clearly decided the point. In United States v. Pierce Auto Freight Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821, the Court was dealing with orders of the Commission granting certificates to each of two bus lines to operate a through bus service from Portland to San Francisco, which they had until that time operated jointly as connecting line carriers. Other carriers over the same route had protested that the new service would divert revenues and threaten impairment of their existing service. The Commission's report said "It would be difficult to conclude that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair the operations of existing carriers as to be contrary to the public interest", but it did not make a specific subordinate finding thereon, but made only the ultimate finding that public convenience and necessity required the new service. The protestants, as plaintiffs, sued in the district court to set aside the Commission's order and complained that there was no specific finding upon the subordinate fact of the competitive effect

of the new service upon existing carriers.[4] The District Court set aside the Commission's orders, saying that "The Commission's report fails to disclose that it gave any consideration to the possibility of adverse effect upon any plaintiffs of the institution of two through line competitive operations between San Francisco and Portland."[5] The Government appealed to the Supreme Court and assigned that the Court erred in "holding that the Commission failed to give consideration to the effect upon plaintiffs of institution of two through line competitive operations between San Francisco and Portland, and that such considerations were necessary under the statutory provisions."[6] The Supreme Court reversed, and, in treating this aspect of the appeal, stated, 327 U.S. at page 531, 66 S.Ct. at page 696:

> "And the findings expressly stated, concerning each application, that the 'present and future public convenience and necessity require the extended operations.'
>
> "Apart from the fact that this was all that the statute required, cf. United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 66 S.Ct. 75 [90 L.Ed. 38], and the further fact that there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in making the separately stated findings, *could not have been oblivious to the competitive consequences of its order or the relation of those*

4. Paragraph 5 of that complaint alleged that "The report and order contained no finding that the granting of these applications or either of them will not result in the impairment of ability of existing carriers to continue to serve the public nor is there evidence in these records or either of them sufficient to sustain such a finding." 42 Records and Briefs in the United States cases, U. S. Supreme Court, October Term, 1945, No. 74 at page 7.

5. Ibid., p. 79.

6. Assignment of errors, Assignment No. 10, ibid., 88.

consequences to the public interest. The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, *including the competitive factors which the Commission inescapably had in mind.*" (Emphasis supplied.)

That authority seems to settle the question adversely to plaintiffs' contention, but we refer to one other case. It is Alabama Great Southern R. Co. v. United States, 340 U.S. 216, at page 227, 71 S.Ct. 264, at page 272, 95 L.Ed. 225, where the Court said, upon a like question, the following:

"As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14(1) of the Interstate Commerce Act, 49 U.S.C. § 14(1), 49 U.S.C.A. § 14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. Manufacturers' R. Co. v. United States, 246 U.S. 457, 487, 489-490, 38 S.Ct. 383, 391, 392, 62 L.Ed. 831. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course § 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. State of Florida v. United States, 282 U.S. 194, 215, 51 S.Ct. 119, 125, 75 L.Ed. 291; United States v. Baltimore & O. R. Co., 293 U.S. 454, 464-465, 55 S.Ct. 268, 272-273, 79 L.Ed. 587. And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. E. g., United States v. Pierce Auto [Freight] Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821; State of North Carolina v. United States, 325 U.S. 507, 65 S.Ct. 1260, 89 L.Ed. 1760; City of Yonkers v. United States, 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400; United States v. Carolina [Freight] Carriers Corp., 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971. Here the Commission found, in con-

formity to the statute invoked, supra note 2, that the differentials prescribed are 'justified as reasonable' and 'necessary and desirable in the public interest.' And 'the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data * * *.' United States v. [State of] Louisiana, 290 U.S. 70, 80, 54 S.Ct. 28, 33, 78 L.Ed. 181. Enough has been 'put of record to enable us to perform the limited task which is ours.' Eastern-Central [Motor Carriers] Ass'n v. United States, 321 U.S. 194, 212, 64 S.Ct. 499, 508, 88 L.Ed. 668."

In making the ultimate finding,—the only finding on this matter required by Section 307, Title 49, U.S.C.A.,—that public convenience and necessity required the new service by applicant, the Commission could not have been oblivious to the competitive consequences of its order upon the plaintiffs or upon the public interest, and its findings are adequate to support its orders here.

Plaintiffs' second point is that there was no substantial evidence that the proposed new service by Trails would not produce such competition and diversion of traffic as would impair plaintiffs' existing service, particularly that of Southern. They rely on the evidence that Southern's traffic has constantly decreased over the last five years and 10 months from 437,085 passengers in 1948 to 250,860 passengers in 1952 and 177,949 passengers in the first 10 months of 1953; that in the last three years and 10 months of its operations its net income was only 1% of its gross revenues, and in the 10 months preceding the hearing it had a net operating deficit of $9,738; that, though it has terminated some service, it operates, on an average, with 22 empty seats per bus, and it argues that Trails, to succeed, would have to divert as much as 48% of the traffic now carried by Southern, and that this would inevitably impair Southern's existing service and oppose the public interest. To the contrary, there was evidence that Southern's busses were not operated as vacantly as it claimed, and that they at times were crowded, and that the pro-

posed new service would create substantial additional traffic. Upon this conflicting evidence it was for the Commission to determine whether the new service would impair existing service and whether, in the light of the complex of the total situation, it would oppose or promote public convenience and necessity. The Commission's finding is supported by substantial evidence, and is conclusive upon us. United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 241, 66 S.Ct. 75, 90 L.Ed. 38; Interstate Commerce Commission v. Parker, 326 U.S. 60, 65, 65 S.Ct. 1490, 89 L.Ed. 2051.

Plaintiffs' next point is that the orders are not supported by definite and specific subordinate findings that the existing service being furnished by them is inadequate, and that there is no substantial evidence that the service now being rendered by plaintiffs is inadequate or that the proposed service by Trails is or will be required by the present or future public convenience and necessity.

What has been said above disposes of the contention that the orders are invalid for lack of definite and specific subordinate findings of inadequacy of existing service, but, moreover, the Commission's order specifically finds "that many persons residing in many communities along U. S. Highway 169 between Tulsa and Kansas City are not receiving adequate service" and that Trails has "met the burden of establishing that public convenience and necessity require its proposed service." The findings are, therefore, fully adequate to support the orders in this respect.

As to whether there was substantial evidence to support these findings, we have pointed out in Note 1, supra, that many witnesses testified to the inadequacy of the existing service and to the need for the new direct, single-line, through, service on U. S. Highway 169 between Kansas City and Tulsa, serving all intermediate points, proposed by Trails and authorized by the challenged orders. In fact plaintiffs tacitly concede that existing service is inade-

quate for the persons residing on the Olathe-Osawatomie segment of highway 169, by saying that the Commission should not have granted authority to Trails to operate, southerly, "beyond Garnett, or, at the most, Iola, Kansas." Such a limitation would still have required a transfer to Southern's busses at Garnett or Iola, Kansas, and, if the traffic be destined for one of the Oklahoma points on highway 169 between South Coffeyville and Oolagah, a second transfer to MK&O busses at Coffeyville, Kansas, and like transfers on the returning or northbound journey, when the testified need was not merely for more connecting line service, but was for direct, single-line, through, service on U. S. Highway 169 between Kansas City and Tulsa, serving all intermediate points, to avoid the inconvenience and delays of those transfers to the potential travelers residing along that highway, which the Commission found "is much too populous to be adequately accommodated by two and three line service." Plaintiffs point to the evidence showing that the use by these witnesses of bus service between the Olathe-Osawatomie, Kansas, segment and the South Coffeyville-Oolagah, Oklahoma, segment, and the reverse, has been spasmodic and infrequent, and will likely be so in the future, and, they argue, it does not amount to substantial evidence of inadequacy or need. The Commission took account of that argument and found that the limited quantity of the traffic was occasioned by the nonexistence of service or the inconvenience, transfers, and delays of the available service. There was ample evidence of inadequacy of existing service, and of need for the proposed direct, single-line, through, service between Kansas City and Tulsa, serving all intermediate points, to support the Commission's finding that public convenience and necessity required such new service by Trails.

Plaintiffs next complaint that there was no substantial evidence to support the finding of fitness and ability of Trails to perform the proposed new service. They point to the fact that the evidence shows, as summarized in Note

2, supra, that Trails is in a "weakened" financial condition. There was evidence, however, that Trails has assets of the book value of nearly a half-million dollars, and that Crescent Oil, Inc., which holds a majority of its stock, and R. J. Johnson and others, have guaranteed payment of all its past and future obligations, and that it has the equipment, to be augmented by new busses on order, necessary to perform the service. This, again, was a question of fact to be determined by the Commission upon conflicting evidence, and its determination of fitness and ability of Trails is supported by substantial evidence.

In this connection, plaintiffs also complain that on April 1, 1954 and prior to the joint board's recommended report and order herein, a contract was made between Trails and Union Transportation Company under which one McRae, managing partner of Union Transportation Company, took over management and control of Trails, and that the Commission knew this, from its records in Control Proceeding No. MC-F-5754, before Division 5 of the Commission rendered its report and order herein, and that this presented an additional question of fitness and ability of Union Transportation Company and of McRae upon which the Commission was required to, but did not, make a finding. The answer is that under Section 307, Title 49, U.S.C.A., the Commission was charged with the duty of determining whether the *applicant*, Trails, was, or was not, "fit, willing, and able properly to perform the service proposed", and not whether, being fit and able as the Commission found, it might lawfully transfer control and management to another, as that matter can only be determined in a separate control proceeding before the Commission; and it is being investigated by, and litigated before, the Commission, at this very time, in a separate control proceeding under Commission Docket No. MC-F-5754. That matter is not properly before us on this review, as this proceeding is in no sense de novo and we are confined to the record as made before the Commission. United

States v. Louisville & N. R. Co., 235 U.S. 314, 35 S.Ct. 113, 59 L.Ed. 245; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443-445, 50 S.Ct. 220, 74 L.Ed. 524; Acker v. United States, 298 U.S. 426, 434, 56 S.Ct. 824, 80 L.Ed. 1257; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344, and plaintiff's offer in evidence, upon the hearing before us, of a transcript of that control proceeding is rejected and excluded.

Plaintiffs' last point is that, though the Commission had authorized temporary service by Trails between Osawatomie and Garnett, Kansas, the joint board erroneously excluded evidence showing the paucity of traffic that moved over that authorized temporary service. We dispose of the point, as did the Commission, by saying that the evidence was not material to the real issue, as the need shown was not for additional connecting line service, but was for single-line through service.

This treats with all of the points raised by the plaintiffs and shows that they are each without merit. Our conclusion is that the Commission's orders here challenged are based upon adequate findings, and that they, in turn, are supported by substantial evidence, and that no substantial error was made by the Commission in the receipt or rejection of material evidence, and that plaintiffs' complaint to enjoin and to vacate said orders of the Commission must be, and it is hereby, denied and dismissed.

All concur.

MAR 23 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 721.

SOUTHERN KANSAS GREYHOUND LINES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

MOTION TO AFFIRM FOR INTERVENING DEFENDANT KANSAS TRAILS, INC.

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Dated March 26, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 721.

SOUTHERN KANSAS GREYHOUND LINES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

MOTION TO AFFIRM FOR INTERVENING DEFENDANT KANSAS TRAILS, INC.

Pursuant to Rule 16, Par. 1 (c), of the Revised Rules of this Court, the intervening defendant, Kansas Trails, Inc., Appellee, moves that the judgment of the District Court be affirmed.

STATEMENT.

This is a direct appeal from a final judgment entered October 3, 1955, by a three-judge District Court convened pursuant to 28 U. S. C. 2284, 2325, which unanimous judgment dismissed a complaint seeking to set aside, enjoin and vacate orders of the Interstate Commerce Commission which issued a Certificate of Convenience and Necessity to this Appellee, authorizing certain motor common carrier authority requested. Appellant is a competing motor carrier in the same general territory but not serving the same and exact points as this Appellee nor does it serve over the same and exact routes granted to this Appellee.

The District Court, in a careful opinion by Judge Whittaker, affirmed the Commission's order and in dismissing Appellant's complaint substantiated the Commission's order on three (3) independent grounds:

1. That the Commission's orders here challenged were based upon adequate findings;

2. That said orders were supported by substantial evidence;

3. That no substantial error was made by the Commission in the receipt or rejection of material evidence.

The pertinent facts, so far as essential to this appeal, are clearly and adequately stated in the order of the Court made on October 3, 1955, which is set out in Appendix A in Appellant's Statement As to Jurisdiction.

The Court held, contrary to Appellant's contentions, that the statute did not require specific findings as to resulting impairment of competitve services as follows:

"In making the ultimate findings—the only findings on this matter required by Section 307, Title 49, U. S. C. A.—that public convenience and necessity required the new service by Applicant, the Commission could not have been oblivious to the competitive consequences of its order upon the plaintiffs or upon the public interest, and its findings are adequate to support its order here" (Page 13a of Appendix A, attached to Appellant's Statement As to Jurisdiction).

ARGUMENT.

In opposition to Paragraph 1 under questions presented on Page 2 of Appellant's Statement As to Jurisdiction, this intervening Appellee respectfully submits that no request for such an express finding was ever made by Appellant. The report of Division 5 of the Commission followed the report of the Joint Board. In the Appellant's exceptions to the Joint Board's report, Appellant did not at that time press the contention that the report was inadequate in that it lacked essential findings. Likewise, in Appellant's petition for reconsideration after the report of Division 5 in January, 1955, the question of the weight of evidence, with respect to impairment, and the question of the adequacy of the report as to such a finding, was in no way raised by the Appellant. If there was anything objectionable to the completeness of the report it could have been raised at that time and properly taken care of by the Commission.

In all fairness to the Commission and the other parties involved, a line must be drawn with respect to the review of issues which were not presented to the Commission. As stated by the District Court in *Trans-American Freight Lines, Inc.*, v. *United States*, 51 Fed. Supp. 405-412, note 10:

> "Plaintiff's petition for reconsideration by the entire commission * * * makes no objection to the omission of findings of factual convenience and necessity under Sec. 207. Under paragraph (a) of Sec. 17 of the Interstate Commerce Act, * * * it is doubtful if any error may be considered by this Court unless previously presented to the entire Commission upon petition, for rehearing or reconsideration; otherwise such a tactic permits an applicant to ambush the Commission."

In answer to Paragraph 2 of Appellants' "questions presented" (Jurisdictional Statement p. 3), this intervening Appellee submits that the prevailing law concerning Interstate Commerce Commission cases, is to the effect that the Commission is not required to spell out each of its subordinate findings in arriving at the ultimate statutory finding. The Court's attention is called to the prevailing law as set forth in *L. E. Wales et al.* v. *United States of America et al.*, 108 Fed. Supp. 928, and upheld by the United States Supreme Court in a *per curiam* decision 345 U. S. 954, on May 19, 1953, in which the Supreme Court states:

> "The Commission, through the application of its expert judgment and experience in, and knowledge of, interstate transportation matters, is the final arbiter upon whether or not additional motor carrier service is required."

In *Norfolk Southern Bus Corporation* v. *United States of America*, 96 Fed. Supp. 736-760, the Court stated:

> "There is no necessity for the Commission to make specific findings concerning the inadequacy of existing service."

Sec. 207 (b) of the Interstate Commerce Act, 49 U. S. C. A. 307 (b), states:

> "No certificate under this chapter shall confer any proprietary or property rights in the use of the public highways."

In arriving at the decision in this case, the lower Court reviewed the findings and order of the Commission which are as follows:

> "Interveners oppose the application of Trails because they believe * * * that the placing in operation of another carrier between Tulsa and Kansas City will result in a competitive situation destructive to them, to the ultimate disadvantage of both the existing carriers and the public."

Thus by inextricable logic when the Commission as it did in its report state the Appellant's contention with respect to undue impairment of service and claimed competitive damage, and then shortly thereafter, found, that the new service was convenient and necessary, there was by necessary implication an expressed finding that the existing service would not be unduly impaired. An additional express statement to this effect would have been redundant and would serve no useful end. Certainly an order of the type at bar should not be set aside simply for a minute dereliction in form of this sort.

The District Court in the instant case carefully considered this particular contention of the Appellant in its decision of October 3, 1955, wherein it correctly pointed out that the case of *Clarke* v. *United States*, U. S. D. C., D. C., 101 F. Supp. 587, was out of harmony with every other case and stated:

> "But, at all events, the Supreme Court has clearly decided the point. In *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 15, 66 S. Ct. 687, 90 L. Ed. 821, the Court was dealing with orders of the Commission granting certificates to each of two bus lines to operate a through bus service from Portland to San Francisco, which they had until that time operated jointly as connecting line carriers. Other carriers over the same route had protested that the new service would divert

revenues and threaten impairment of their existing service. The Commission's report said 'It would be difficult to conclude that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair the operations of existing carriers as to be contrary to the public interest,' but it did not make a specific subordinate finding thereon, but made only the ultimate finding that public convenience and necessity required the new service. The protestants, as plaintiffs, sued in the district court to set aside the Commission's order and complained that there was no specific finding upon the subordinate fact of the competitive effect of the new service upon existing carriers. The District Court set aside the Commission's orders, saying that 'The Commission's report fails to disclose that it gave any consideration to the possibility of adverse effect upon any plaintiffs of the institution of two through line competitive operations between San Francisco and Portland.' The Government appealed to the Supreme Court and assigned that the Court erred in 'holding that the Commission failed to give consideration to the effect upon plaintiffs of institution of two through line competitive operations between San Francisco and Portland, and that such considerations were necessary under the statutory provisions.' The Supreme Court reversed, and, in treating this aspect of the appeal, stated, 327 U. S., at page 531, 66 S. Ct., at page 696:

> "And the findings expressly stated, concerning each application, that the 'present and future public convenience and necessity require the extended operations.'
>
> "Apart from the fact that this was all that the statute required, cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 66 S. Ct. 75 [90 L. Ed. 38], and the further fact that there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in

making the separately stated findings, *could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest.* The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, *including the competitive factors which the Commission inescapably had in mind*" (Emphasis supplied).

This Appellee submits that the above Court finding follows the preponderance of the law in these matters, that this same and exact question has been decided by this Court many times in the past, and that nothing new has been presented by the Appellant herein.

In answer to Question No. 3 set out on pages 3 and 4 of the Appellant's Statement As to Jurisdiction this Appellee submits that in an endeavor to confuse the Court the Appellant is here directly begging the primary question which was before the Commission in the instant matter, *i. e.*, the need and convenience of the traveling public in the area under consideration.

The Commission in its Findings and Order directly took into consideration the facts argued by the Appellant herein, and found that the limited quantity of the traffic was the result of the nonexistence of service or the inconvenience, transfers, and delays of all available service. On Sheet No. 11 of its decision of November 23, 1954, wherein the decision of the Joint Board was upheld, the Commission, after fully discussing all the contentions of all Protestants, including the same and exact matters presented in Question No. 3 of the Appellant herein, stated:

"It is clear from the record that persons residing in many communities along U. S. Hlighway 169 between Tulsa and Kansas City are not now receiving

adequate service. The territory involved is much too populous to be adequately accommodated by two and three line service. On the one hand, the granting of Greyhound's (Appellant herein) application would cure some, but not all, of the defects in existing service. On the other hand, the granting of Trails' (Appellee herein) application would result in direct, single-line service between all points on U. S. Highway 169 between Tulsa and Kansas City. The burden of establishing that public convenience and necessity require a proposed service rests upon an applicant. We conclude that Trails (Appellee herein) met the burden imposed upon it, but that Greyhound (Appellant herein) did not meet the burden imposed upon it. The evidence adduced in support of Greyhound's (Appellant) falls far short of being sufficient. * * * The answer to such contention is, of course, that the need disclosed by the witnesses is not for additional two-line service but is, rather, for adequate single-line service."

In arriving at its decision the Commission in this matter had before it two applications which were decided in the same Order, No. 1 that of Kansas Trails, Inc. (Appellee herein), under Docket No. MC-108408 (Sub. No. 8)—Extension—from Osawatomie, Kansas, to Tulsa, Oklahoma, via U. S. Highway 169; and No. 2 that of Southern Kansas Greyhound Lines, Inc. (Appellant herein)—Extension—from Garnett, Kansas, to Kansas City, Missouri, via U. S. Highway 169. So that in arriving at its decision, the Commission had for consideration many facts presented to it by the Appellant in an Applicant case and not just those which are ordinarily presented it in a Protestant case. and therefore, could not have been oblivious of Appellant's evidence as to impairment of service, but rather after having fully considered all evidence before it, denied an Extension to Appellant, and granted an Extension to the Appellee.

In its findings the Commission stated:

"We find, in MC-108408 (Sub. No. 8), that the present and future public convenience and necessity require operation by applicant (Trails—Appellee herein) as a common carrier by motor vehicle in interstate or foreign commerce, of passengers and their baggage and of express in the same vehicle with passengers, between Osawatomie, Kansas, and Tulsa, Oklahoma, over U. S. Highway 169, through Garnett, Iola, Chanute, Cherryvale, and Coffeyville, Kansas, and South Coffeyville, Delaware, Calogahm and Owasso, Oklahoma, serving all intermediate points; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a certificate authorizing such operation should be granted.

We find, in MC-30608 (Sub. No. 7), that applicant (Appellant herein) has failed to establish that the proposed operation is required by the present and future public convenience and necessity, and that this application should be denied."

In view of the above and in light of the record as a whole, the fact is that all uncontroverted testimony and evidence in this matter was to the public need and for the direct single-line service proposed by the Appellee Trails herein, and not for the continuation of no service or at best a combination of two or three line service offered and performed by the Appellant Greyhound in conjunction with the other protesting Bus Companies.

In *A. B. & C. Motor Transportation Co.* v. *United States*, 69 F. Supp. 166, and in *Inter-City Transportation Co.* v. *United States*, 89 F. Supp. 441, the Court pointed out that the Commission's report gave a concise history of the proceedings, a summary of the transportation background of the applicant, details of the routes sought, and existing

service, and referred to the Commission's findings that present and future public convenience and necessity required the additional service. (All exactly as was done by the Commission in the Order under consideration herein.) The Court, in rejecting the claim that the findings were inadequate, said:

> "On that comprehensive report as a matter of common justice to the Commission, we must hold that the decision makes sense. Based on sound foundation of evidence, the Commission concluded that it was doing a progressive, good thing in giving the territory in question the transportation sought; in giving that territory services needed now and for the future."

In refutation of Appellant's Question No. 3 this Appellee calls the Court's attention to a long line of decisions, exemplified by: *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448-450, affirmed 323 U. S. 668; *Lang Transportation Corp.* v. *United States*, 75 F. Supp. 915-929; *Inland Motor Freight Lines* v. *United States*, 36 F. Supp. 885; in which the Courts have laid down the following basic law:

> *"Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may best be served by the issuance of a certificate to a new competitor"* (Emphasis supplied).

We submit, in the words of Circuit Judge Parker as stated in *Beard-Laney* v. *United States*, 83 F. Supp. 27-32, and affirmed 338 U. S. 803:

> "It is for the Commission, not the Courts, to say what public convenience and necessity requires and

> whether these will be better served by licensing an additional carrier, than by permitting those already licensed to expand their facilities";

that Appellant has failed to present any new situations or problems to this Court by its appeal herein.

In answer to Question No. 4 (Jurisdictional Statement p. 4) this Appellee submits that the entire record as a whole was taken into consideration, both by the District Court and by the Interstate Commerce Commission, in arriving at the questioned decisions; and that said record amply contains substantial evidence, adequate findings, ample jurisdiction under Title 49, Sec. 307 (a), and under Sec. 10 (e) of the Administrative Procedure Act, Title 5, U. S. C., Sec. 1009 (e), to substantiate all of the Orders and Decisions heretofore rendered.

The Court's attention is called to the fact that this Appellee Kansas Trails, Inc., under MC-108408 and its existing Subs, at all times, both prior to the application in question, and after proper hearings held thereon, held authority to serve the involved Oklahoma points of Oalagah, Talala, Watova, Nowata, Delaware, Lenapah, and South Coffeyville; and the involved Kansas points of Topeka, Independence, Coffeyville, Cherryvale, Chanute, Humbolt, Iola, Osawatomie, and those points on U. S. Highway 169 intermediate between Osawatomie and Kansas City, Missouri; and also the involved point of Kansas City, Missouri.

All major towns and cities requested by this Appellee, with the one exception of Tulsa, Oklahoma, were being served by Appellee, but because of the disconnected and circuitous routes involved under its then authority, it was impossible for Appellee to offer or perform a *through* service for the public between the points involved, even though public demand warranted it.

This application was made for the purpose of permitting Kansas Trails, Inc. (Appellee), to provide for the public patrons of Northeastern Kansas a *direct through* bus operation to Tulsa, Oklahoma, and intermediate Northeastern Oklahoma points. There can be no question that the Eastern Kansas territory involved is one of the most heavily populated areas in Kansas, and that its industrial, commercial and educational growth has been hampered by the lack of direct public transportation between the Kansas points and the Oklahoma points involved.

This Appellee also serves between all Kansas points involved in intrastate commerce. The Kansas Corporation Commission under date of January 15, 1954, over the protest of the Appellant herein, granted Kansas Trails, Inc., authority to serve via U. S. Highway 169 between Olathe, Kansas, on the one hand and Coffeyville, Kansas, on the other hand, serving all intermediate points, with certain restrictions.

The main purpose behind the grant of authority requested herein is to perform the demanded public service, by closing the gaps in the disjointed and circuitous bus operations of Kansas Trails, Inc., permitting Appellee to perform a single-line service between the three major gateways Kansas City, Missouri, Tulsa, Oklahoma, and Topeka, Kansas, serving all intermediate points between Kansas City and Tulsa and Tulsa and Topeka; single-line service which can not be offered nor performed by the Appellant, nor by any other carrier now in existence.

As can be seen from the above Kansas Trails, Inc., presently holds Interstate Commerce Commission authority to serve between Kansas City, Missouri, and Osawatomie, Kansas, serving intermediate points, via U. S. Highway 169, no other Bus carrier serves between these points, and can not be required to reprove convenience and neces-

sity between these points, therefore, Appellee requested and was granted authority to serve between Osawatomie, Kansas, on the one hand, and on the other, Tulsa, Oklahoma.

It is a well settled matter of law that in extension applications, the Interstate Commerce Commission does not require stringent proof of convenience and necessity between every point presently authorized to be served on the one hand and every point requested to be served on the extension. Ample provision is made under the Interstate Commerce Act and under the Rules and Regulations of the Interstate Commerce Commission to prevent the tacking of one authority onto another and thereby prevent the rendering of a through service between two separate portions of an authority, or between portions of a combined authority, when reasons therefor are found to exist by the Commission. The Appellant herein and all other Protestants were well represented by numerous well known motor-carrier legal counsel, many of whom are recognized as experts in Bus transportation field, and yet never to this day has any one of them ever requested the Interstate Commerce Commission nor the District Court to impose a restriction against the tacking of the authority held and the extended authority requested and granted herein. Therefore, Appellant under Rule 87 of the General Rules of Practice before the Commission, which provides:

> *"An objection not pressed in brief will be considered as waived"* (Emphasis supplied);

has waived its right to now request such a restriction, and under the Law and in Equity should be estopped from bringing up the matter at this late date.

In effect that is what Appellant is requesting under Question No. 4 (Jurisdictional Statement p. 4) and again in its argument at pp. 19-20 of said Statement.

The Joint Board, Division 5 of the Commission, the entire Interstate Commerce Commission, and now the three-judge District Court have all unanimously found that the public convenience and necessity substantiated by substantial evidence, requires the extended authority as granted to this Appellee.

The Appellant's attack appears to be directed at the conclusions of the Commission and of the lower Court, rather than at the sufficiency of the evidence. A long line of decisions of this Court has always held that the function of "weighing" the evidence is peculiarly the problem of the Commission "appointed by law and informed by experience," and not for the Courts. *Virginia Stage Lines* v. *United States* 48 F. Supp. 79, *O'Malley* v. *United States,* 38 F. Supp. 1, *Hanna Furnace Corp.* v. *United States,* 53 F. Supp. 341, affirmed 323 U. S. 667; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501; *Consolidated Freightways* v. *United States,* 83 F. Supp. 811.

The issue before the Court is simply whether there is rational basis for the Commission's findings. It is not whether this Court may have reached different findings on the record made. We believe that the Court will have no difficulty in determining to its own satisfaction that there was substantial evidence presented to support the Orders and Decisions in question.

CONCLUSION.

For the foregoing reasons, we conclude that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; that the decision below is correct. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

J. WM. TOWNSEND,
OLIVER D. RINEHART,
GEORGE F. SHORT,
JOHN MCCALL,
Attorneys for Appellee, Kansas Trails, Inc.

Dated: March 26, 1956.

PROOF OF SERVICE.

I, J. William Townsend, Attorney for Kansas Trails, Inc., Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 26th day of March, 1956, I served copies of the foregoing Motion to Affirm on the several parties, as follows:

On the United States, by Air-Mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission, by Air-Mailing a copy postage prepaid to Robert W. Ginnane,

Esquire, its General Counsel, and to Isaac K. Hay, Esquire, Assistant General Counsel, at the office of the Interstate Commerce Commission, Washington 25, D. C.

On Southern Kansas Greyhound Lines, Inc., Appellant herein, by Air-Mailing a copy postage prepaid to its Attorney of Record, Jack R. Turney, Jr., properly addressed to his office at 2001 Massachusetts Ave. N. W., Washington 25, D. C.

J. WILLIAM TOWNSEND,
204 Central Building,
Topeka, Kansas.

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380336—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 721

SOUTHERN KANSAS GREYHOUND LINES, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the District Court be affirmed on the ground that the questions presented by the appeal are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from a final judgment, entered October 3, 1955, of a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325. The judgment dismissed appellant's com-

plaint seeking to set aside an order of the Interstate Commerce Commission. The Commission order, entered on November 23, 1954, granted a motor carrier a certificate of public convenience and necessity to provide bus service from Kansas City, Missouri, to Tulsa, Oklahoma, and all intermediate points.

Kansas Trails, Inc. ("Trails") held Commission certificates which authorized motor bus operations between various communities on U. S. Highway 169, which connects Kansas City, Missouri, and Tulsa, Oklahoma. The distance between the two cities over Highway 169 is approximately 250 miles. Since Trails certificates covered five unconnected segments, the existing "gaps" prevented it from providing through service between Kansas City and Tulsa, with service to all intermediate points.

On June 29, 1953, Trails applied for additional operating authority to conduct single-line through bus service between Kansas City and Tulsa and all intermediate points. Appellant, a motor bus carrier who operates between Kansas City and Tulsa, intervened to oppose Trails' application. Appellant's regular route follows Highway 169 for about 96 miles from Garnett to Coffeyville, Kansas, and to that extent there would be competition between appellant's service and the proposed service of Trails.[1]

[1] Contrary to appellant's contention, Trails' proposed service is not for "precisely the same traffic" (Juris. State-

Appellant also applied for authorization to extend its operations along Highway 169. The application was for a 65-mile segment between Kansas City and Garnett, Kansas, which duplicated Trails' present and proposed service. Trails opposed the application. The Commission considered both applications together.

After extensive hearings, the Commission issued its report (R. 7–21) in which it granted Trails' application and denied appellant's.[2] The Commission found, as required by Section 207 (a) of the Interstate Commerce Act, that Trails "is fit, willing, and able properly to perform" the proposed service and that "the present and future public convenience and necessity require" such operations. These ultimate findings rested on the following subsidiary findings, among others: that persons residing in communities along U. S. Highway 169 between Tulsa and Kansas City are not now receiving adequate service; that the territory involved is much too populous to be adequately accommodated by two and three line service; and that the granting of Trails' application would result in direct, single-line service

ment 12) as that provided by existing carriers. Even as to the Garnett-Coffeyville segment, appellant's service and Trails' proposed service are not identical, since appellant does not provide single-line service between communities in that segment and other points on Highway 169 between Kansas City and Tulsa.

[2] No appeal has been taken from that part of the report denying appellant's application.

between all points on U. S. Highway 169 between Tulsa and Kansas City. In reaching its decision the Commission noted appellant's objection that the addition of another carrier between Tulsa and Kansas City would "result in a competitive situation destructive" to the existing carriers. (R. 16.)

On appeal the district court unanimously affirmed the Commission's order. The court held (Juris. Statement 17a) that the Commission's order was based on adequate findings of fact, and that the findings were supported by substantial evidence. The court also held (Juris. Statement 8a–9a) that although the Commission must "hear and consider" evidence of the effect of the grant of a certificate on existing carriers, the statute did not require—as appellant contended—that the Commission make an affirmative finding as to competitive effect.

ARGUMENT

1. Appellant's principal contention (Juris. Statement 11–19) is that under Section 207 (a) the Commission may not find that the public convenience and necessity requires proposed service unless it affirmatively finds that the proposed service will not adversely affect existing carriers. We submit, however, that the Act does not require the Commission to make a finding as to competitive effect in order to grant a certificate for new operations.

Section 207 (a) of the Act requires the Commission, as a prerequisite to granting a certificate authorizing new operations, to make two ultimate findings: (1) that the applicant is fit, willing, and able properly to perform the proposed service and (2) that the proposed service is or will be required by the present or future public convenience and necessity. Both findings were made here, and they were fully supported by subsidiary findings of fact. (Statement, pp. 3–4, *supra*.) It is settled that the Commission need not make detailed findings of fact in non-damage cases, so long as the "essential basis of its judgment is sufficiently disclosed in its report". *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 228. Nor is it necessary for the Commission to make a rigid set of subsidiary findings, since they "will vary with the statutory authority invoked and the context of the situation presented." *Ibid.* And this Court has rejected the contention now made by appellant that the Commission must make a positive finding as to competitive effect. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515. In that case the lower court invalidated the Commission order on the ground, among others, that "the Commission's Report fail[ed] to disclose that it gave any consideration to the possibility of adverse effect upon" existing carriers. *Id.* at 522. On review, this Court reversed and pointed out that the Commission, in making its finding of public convenience and necessity, "could

not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest." *Id.* at 532. As the court below correctly held, the Commission must "hear and consider" evidence as to competitive effect in determining whether proposed service is in the public interest, but the statute does not require a specific finding.

The two decisions of this Court on which appellant relies do not support its contention that the Act requires an affirmative finding as to competitive effect. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60; *American Trucking Associations, Inc.* v. *United States*, 326 U. S. 77. Indeed, they substantiate the position of the court below. In *Parker* the Court held that the National Transportation Policy requires the Commission, when granting a railroad's application for auxiliary motor carrier service, to "weigh the needs of the railroad against disadvantages to the motor carriers." 326 U. S. 60, 68. In *American Trucking*, which also involved a grant of motor carrier authority to a railroad, this Court held that it was error for the Commission to exclude evidence as to the economic effect of the grant on independent truckers, since the Commission must "consider the disadvantage to the public of a serious impairment" of existing carriers. 326 U. S. 77, 86. Clearly, both cases agree with the district court that the Commission must "consider" and

"weigh" evidence as to competitive effect; they do not go further and insist on a specific finding.[3]

2. Appellant further argues (Juris. Statement 15–17) that the Commission's report does not disclose that it considered the question of possible impairment of the existing carriers. This contention is without merit. The Commission's findings that the existing service was inadequate and that the public convenience and necessity required Trails' proposed operations are but other ways of saying that the grant of the certificate will not unduly prejudice the existing carriers. The Commission's report plainly indicates that it considered appellant's objection "that the placing in operation of another carrier between Tulsa and Kansas City will result in a competitive situation destructive to them, to the ultimate disadvantage of both the existing carriers and the

[3] Appellant relies on three district court decisions which are equally inapplicable. Two cases cited (*L. A. Tucker Truck Lines* v. *United States*, 115 F. Supp. 647 (E. D. Mo.); *Hudson Transit Lines* v. *United States*, 82 F. Supp 153 (S. D. N. Y.), affirmed, 338 U. S. 802) deal only with the question of the substantiality of the evidence and not the adequacy of the findings of fact. The third case (*Clarke* v. *United States*, 101 F. Supp. 587 (D. D. C.)) does hold that the Commission should have made a finding as to competitive effect but that decision is clearly distinguishable. There the applicant sought an alternative route, not new operating authority. The district court held that since an alternative route is granted for reasons of economy and not public need for additional service, it is incumbent on the applicant to show that the new route will not injure existing carriers. 101 F. Supp. 587, 592–594.

public" (R. 16). Moreover, the court below, after carefully reviewing the Commission's action, concluded that "the Commission could not have been oblivious to the competitive consequences of its order." (Juris. Statement 13a.)

3. Finally, appellant contends (Juris. Statement 17–20) that the district court erroneously held that there was substantial evidence in the record that the grant of Trails' application would not seriously impair existing carriers and that the public convenience and necessity required the proposed operations between Kansas City and Tulsa. These issues were fully briefed and argued before the district court. As the opinion below shows, it was only after careful review of all the evidence that the court concluded that the Commission's order was amply supported by substantial evidence (Juris. Statement 13a–15a, 17a).

This Court has indicated that the initial reviewing court has "primary responsibility" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502) for determining '[w]hether on the record as a whole there is substantial evidence to support agency findings," and that it will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 491. We submit that there are no special circum-

stances here which would warrant a second reexamination of the record. See *New England Divisions Case,* 261 U. S. 184, 203–204; *Radio Corp. v. United States,* 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted,

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JOHN BODNER, JR.,
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General Counsel,
Interstate Commerce Commission.

MARCH 1956.

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APR 1 8 19
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 721

SOUTHERN KANSAS GREYHOUND LINES, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal From The United States District Court For The Western District of Missouri, Western Division

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

JACK R. TURNEY, JR.
Attorney for Appellant.

Dated April 17, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Appellant, Southern Kansas Greyhound Lines, Inc., pursuant to Rule 16, paragraph 3, of the Revised Rules of this Court, files this its brief in opposition to the Motions of appellees and intervening appellee to affirm the judgment of the District Court.

CONTEXT OF THE SITUATION

The order of the Interstate Commerce Commission, which the Court below upheld, granted a certificate to Kansas Trails, Inc. authorizing it to operate a motor bus line between Kansas City and Tulsa, and to compete for the same traffic from which appellant derives all but a small portion of its revenues. Appellant's operation between these points had been operating at a deficit for a year or more at the time of the hearing, (R. 1398-1428, 1061, 1067-8) and it had already been forced by insufficient traffic to reduce its service.

(R. 980-1). Its traffic had declined 50% in recent years, due to increased automobile ownership in the area. (Ex. 50, R. 1512, 1071). The proposed schedules would add 40% to the schedules of appellant between these points, for which there is already insufficient traffic. (R. 992-3). Diversion of some of appellant's traffic would be inevitable (R. 993). Any further diversion from appellant's operation would necessitate further impairment of its service. (R. 993).

In its recitation of the position of the parties, and prior to discussion of the issues (R. 1556A), the report of the Commission observed that appellant had opposed the application upon the ground that impairment of its service would result.[1] It did not, however, mention further that issue or any of the voluminous evidence relating thereto. Nowhere in the report was there an indication of actual consideration or weighing of the issue, or even a *suggestion* of a finding, conclusion, determination, or opinion as to whether appellant's existing service actually would be impaired by the operation authorized. Other than the initial observation, the issue is ignored.

The Court below held that the Commission is required to weigh, consider,[2] and determine[3] the issue of impairment of appellant's service, but ruled, in effect, that the Commission is not required to show *in its report* that it has actually done so, by a finding, discussion, or otherwise. It held that satisfaction of the requirement must be conclusively presumed from the

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[1] The report's only mention of the issue is quoted in the opinion of the Court below, Jurisdictional Statement, 5a.

[2] Jurisdictional Statement, 9a.

[3] Jurisdictional Statement, 14a.

Commission's ultimate statutory conclusion that the public convenience and necessity require the operation authorized.

The evidence and finding of inadequacy of existing service were confined to service to or from several small intermediate points, where only two or three-line service is available. (R. 1554A-1555A, 1557-1557A). There was no finding or evidence that appellant's existing *single-line* service for passengers traveling between the termini proper was inadequate. Nevertheless, the Court below upheld the grant of authority to carry passengers traveling between these cities.

QUESTIONS SUBSTANTIAL

Before turning to the substantiality of the error of the Court below, it should be noted that the questions here presented satisfy both of the recognized criteria of substantiality warranting certiorari. In the first place, *both of the other two statutory three-judge Courts which have been called upon to determine the principal issue here presented held directly contrary to that ruling,* one of which, on appeal, was affirmed by this Court.

> *Hudson Transit Lines* v. *United States,* (S.D. N.Y.), (1948), 82 F. Supp. 153, affirmed, *per curiam* (1949), 338 U.S. 802[1];

[1] Contrary to appellees' contention (Motion p. 7, footnote 3), the cited case expressly dealt with the absence of the necessary finding. The Court said (page 157):

> "The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. Interstate Commerce Commission v. Parker, Supra. *No such finding has here been made,* nor is there any evidence to support such a finding." (Emphasis supplied.)

Clarke v. *United States*, (D. of D.C.), (1951), 101 Supp. 587.[1]

Wholly aside from the fact that the reasoning of those cases is sounder and more "substantial" than that in the case here below[2] there clearly exists a "real and embarrassing conflict of opinion and authority", sufficient to warrant even a writ of certiorari. *A fortiori*, it warrants consideration of the merits of the instant case, which is before the Court on statutory right of appeal.

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[1] Contrary to appellees' contention (Motion, page 7, footnote 3), the Court there held that a finding upon the issue of impairment was required *not because* an alternate route application was involved, but *in spite of* that fact. The Court expressly ruled (page 591) that the mere fact that the application is for alternate route authority "*does not eliminate the full applicablility of the general principles.*"

Cf. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 69: "Consequently the issuance of the certificate is subject to all the requirements of any other application for a certificate of operation of motor lines."

[2] For example, the Court in the *Clarke* case was not content to merely cite the cases which it deemed dispositive of the question, but established, by sound logic, as well as precedent, (a) that the issue of impairment is a vital element of public convenience and necessity under fundamental principles of regulatory law, (b) that these general principles are applicable to all applications under Section 207, including alternate route applications, (c) that the feature of the Commission's *finding* that the proposed operation would not be unduly prejudicial to existing carriers was a principal factor in the doctrine of the *Parker* decision, infra, (d) that the "cryptic references" in the Commission's report did not constitute a finding upon this essential criterion, and finally (e) that the law is settled that the Courts "cannot exercise even our limited power of review unless the findings of fact are adequate to indicate that the Commission did consider those criteria which the law requires".

National Labor Relations Board v. *Pittsburgh Steamship Company*, (1950), 340 U.S. 498, 502;

Layne & Bowler Corp. v. *Western Well Works*, (1922), 261 U.S. 387, 393.

The principles here in issue involve the *definition* of public convenience and necessity governing the authorization of transportation service under the Interstate Commerce Act. They are concerned with the protection to be accorded the public from such competition as would result in impairment of service,—one of the main purposes of the requirement of proof of public convenience and necessity.

Texas & Pacific Railway Co. v. *Gulf, Colorado & Santa Fe Railway Co.*, (1926), 270 U.S. 266, 277;

Texas & New Orleans Railway Co. v. *Northside Belt Railway Co.*, (1927), 276 U.S. 475, 479.

As the statutory Court declared in the *Clarke* case, supra, involving the same question:[1]

> "If there be traffic enough for only one carrier, only one carrier will be certificated. The public interest in that situation is for service. Only if there be traffic enough to support efficient operation by more than one carrier does the public interest require the competitive operation of two carriers. . . . If the traffic between those points is enough to preserve the financial stability of only one carrier, the presence of two carriers and the competition between them would inevitably result in the deterioration of service, to the injury of the public."

[1] 101 F. Supp. 587, at pages 590, 591.

Finally, the principles here in issue involve the National Transportation Policy[1] to "foster sound economic conditions in transportation and among the several carriers".

Thus the questions here presented involve "principles the settlement of which is of importance to the public as distinguished from that of the parties"—the second recognized basis for granting certiorari.

National Labor Relations Board v. *Pittsburgh Steamship Company,* supra;

Layne & Bowler Corp. v. *Western Well Works,* supra.

ARGUMENT

1. In The Context Of The Situation Presented, The Commission Was Required To Show Specifically In Its Report That It Had Determined The Basic Issue Of Impairment

In the first place, the Motion of appellees ignores the fact that the Commission has consistently held for 20 years, with the apparent approval of this Court, that the question of impairment of existing service is an essential issue which must be *specifically determined* in proceedings under Title 49 U.S.C. Section 307(a):[2]

Pan American Bus Lines Operations, (1936), 1 M.C.C. 190, 203;

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[1] Title 49 U.S.C. preceding Sec. 301.

[2] Typical of the Commission's declarations is the following from the *Kansas City Southern* decision, quoted with apparent approval of this Court in *Interstate Commerce Commission* v. *Parker,* loc. cit.,: "*It remains to be determined* whether, in accordance with the definition of 'public convenience and necessity' in the *Pan-American* case, (1 M.C.C. (F) 190), 'it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.'" (Emphasis supplied.)

Tri-State Transit Co. of Louisiana, Inc., (1941), 29 M.C.C. 381, 401;

Kansas City Southern Transport Co., (1938), 10 M.C.C. 221, 236.

Interstate Commerce Commission v. *Parker*, (1945), 326 U.S. 60, 72 (Footnote 7).

It is significant that the Commission's report which was under review in—

United States v. *Pierce Auto Freight Lines*, (1945), 327 U.S. 515,

the principal case relied upon by the Court below and appellees, expressly recognized this same requirement[1].

Second, appellees, like the Court below, have misconstrued the decision of this Court in—

Interstate Commerce Commission v. *Parker* (1945) 326 U.S. 60, 69-70.

As recognized by the statutory courts in both the *Clarke* and *Hudson Transit* cases, *supra*, the *Parker* decision upheld the Commission's jurisdiction to issue the certificate there in issue, not on the ground that the Commission had merely received evidence on and secretly pondered the question of impairment, but

[1] 46 Transcripts of Records & File Copies of Briefs, United States Supreme Court, October Term, 1945, No. 74, at p. 38: "Certainly any motor carrier may file an application under section 207(a) of the act and the issues would be, as in these proceedings, whether the proposed service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and *whether it can be served by an applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.*" (Emphasis supplied.)

squarely upon the ground that the Commission had *found* that existing carrier operations would not be unduly prejudiced by the proposed operations. That this was the basis was not only expressly stated *twice* in the decision,[1] but was emphasized in the dissent, which challenged the evidence supporting that finding.[2]

In the companion case,

> *American Trucking Association* v. *United States*, (1945), 326 U.S. 77,

this Court readopted its pronouncements of principle in the *Parker* case, but set aside the Commission's decisions because, although there was a finding that no impairment would result, the Commission had excluded certain evidence respecting impairment which it was its duty to weigh and consider in making its finding upon that issue.

The rationale and doctrine of these decisions is, as held in the *Clarke* and *Hudson Transit* cases, *supra*, that the issue of impairment is a basic issue which must be *specifically* weighed, considered, and deter-

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[1] The Court declared: "Since, however, on adequate evidence the Commission *found* that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M.C.C. (F) 725, 726, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. The public is entitled to the benefits of improved transportation. Where that improvement depends in the Commission's judgment upon a unified and limited rail-truck operation which is *found* not 'unduly prejudicial' to motor carrier operations, the Commission may authorize the certificate even though the existing carriers might arrange to furnish successfully the projected service."

[2] Id. 326 U.S. at p. 76.

mined in the report. It is *not*, as held by the Court below, merely that evidence of impairment must be received, whereupon the issue will be presumed to have been "weighed and considered," even in the absence of any specific mention or determination in the report. The latter interpretation not only is not justified by those decisions, but would reduce the requirement to a meaningless and futile thing, affording no protection against arbitrary and capricious agency action.

Third, the ruling of the Court below would defeat the very purpose of judicial review. The function of the Court in judicial review is to make certain that the agency, in reaching its ultimate conclusions, applied the applicable criteria and weighed, considered, and determined the issues basic to those ultimate conclusions. If the report is silent on such an issue, the Court cannot make certain that the agency complied with those requirements. This Court has said many times that it cannot exercise its power of review unless the findings of fact in the report are adequate to indicate that the agency did consider the basic criteria.

> *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, (1945), 324 U.S. 626, 634.

Contrary to the ruling of the Court below, and the contention of appellees, (Motion, pages 4-6), the determination of such a basic issue cannot be supplied by inference or implication from the statutory conclusion.

> *Atchison, Topeka and Santa Fe Railroad Company* v. *United States*, (1934), 295 U.S. 193;
>
> *Florida* v. *United States*, (1930), 282 U.S. 194;
>
> *United States* v. *Pierce Auto Freight Lines*, (1945), 327 U.S. 515, 533.

Appellees, as did the Court below, rely upon two cases in support of the ruling and Motion to Affirm. The first,

> *Alabama Great Southern Railroad Co.* v. *United States*, (1950), 340 U.S. 216,

obviously does not support appellees' contention that the statutory conclusion is sufficient, for it expressly declares that the Commission is *not* relieved of the duty of making the basic findings essential to the validity of the order, and that those basic findings "will vary with the statutory authority invoked and the context of the situation presented". In the context of the situation *here* presented, the issue of non-impairment is not only *basic*, but *crucial*.

The other case relied upon by the Court below and appellees is—

> *United States* v. *Pierce Auto Freight Lines*, (1945), 327 U.S. 515.

Contrary to the ruling of the Court below and the contention of appellees, that case did *not* "settle the point adversely to" or "reject the contention now made by" appellant. The issues there determined were entirely different from those here presented.

In the *Pierce* case there were *two* conflicting applications for through-line operation. The Commission expressly found that the situation required either granting or denying both.[1] It further found expressly:

> 1. That the Commission's report must determine whether the new proposed services could be operated "without endangering or impairing the op-

[1] Id. 327 U.S. at page 523, footnote 14.

erations of existing carriers contrary to the public interest;"[1]

2. That the applicants were already transporting the bulk of the traffic between the points involved, and that the traffic involved was increasing;[2]

3. That "... From the facts heretofore discussed ... it would be difficult to conclude that authorizing applicants to perform the operations set forth in our findings herein would so endanger or impair the operations of existing carriers as to be contrary to the public interest. Certainly there is no evidence of any impairment of existing service if Consolidated is authorized to extend its route southward from Klamath Falls, where there is now no service, through or joint, between points in central and eastern Oregon and Washington over the proposed routes;"[3]

4. That existing carrier operations between the points were negligible.[4]

None of the above findings were made in this report. The error complained of in that case was that the Commission failed to find expressly that there was a need for *two* through-line operations which would be in competition with one another.[5] This Court overruled that

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[1] 46 Transcripts of Records & File Copies of Briefs, U. S. Supreme Court, October Term, 1945, No. 74, at p. 38.

[2] Ibid. at pp. 39, 40.

[3] Ibid, p. 40.

[4] 327 U.S. 531, footnote 17.

[5] 327 U.S. at page 530: "Appellees say that the order granting both applications is defective in that it is not founded upon an express finding or indeed upon any finding that there was a need for *two* through-line operations which would be in competition with one another."

contention. The language of this Court, quoted by the Court below, was directed solely to that alleged failure of the report and not to deficiencies like those of the instant report. In citing the quotation as disposing of the question here presented, the Court below wholly overlooks the footnote appended thereto, which declared:

> "The Commission has recognized the value of reasonable competition (citing cases), *in no case perhaps more clearly than in those presented on this appeal.*" (Emphasis supplied)[1]

It also overlooks the concluding half of the paragraph from which the quotation itself was taken, which reads:[2]

> "Only the most hypercritical reading of the findings, and one which ignores the report's explicit statements in many respects, could construe them as meaning only that *each* operation was required by public convenience and necessity without any regard to the competitive consequences of granting *both*. The Commission should not be required to rewrite its report simply to say, redundantly we think, that *both* operations, as well as each, are required by public convenience and necessity."

That is not the issue here. The question *here* is whether the Commission may remain entirely silent upon the basic issue of impairment, and rely solely upon a presumption from the ultimate statutory conclusion. In its proper context, the quoted language of the *Pierce* decision did not deal with or determine that question. It is highly significant, however, that

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[1] Id. 327 U.S. at page 527, footnote 20.

[2] Id. 327 U.S. at page 532.

the *Pierce* decision expressly held that the *other* ultimate conclusion specified in Section 307(a)[1] would *not* have been enough, *in the absence of the basic finding to support it.*[2]

The decision of the Court below is based entirely upon a misconstruction of the *Pierce* case and is erroneous, and the Motions to Affirm are without merit.[3]

2. The District Court Erred In Holding That The Reviewing Court Must Presume That The Commission Considered and Weighed The Evidence Relating To The Issue of Impairment of Existing Service, Despite The Absence of Any Indication That It Did So.

Much of what was said with respect to the Commission's duty to show affirmatively in the report that it had *determined* the issue of impairment of existing service, is equally applicable to the Commission's duty to show affirmatively in the report that it had "*weighed and considered*" that issue. Obviously, in the absence of such a showing the Court would have no way of knowing whether the Commission actually did "weigh and consider" the evidence and the requirement of weighing and considering would become meaningless and futile.

Appellees contend (Motion, pages 7-8) that the Commission's ultimate conclusion in the statutory language

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[1] i.e. fitness, willingness, and ability.

[2] 327 U.S. at p. 533.

[3] The contention of intervenor-appellee (Motion, pages 3-4) that the issue was not raised before the Commission is untenable. Appellant, from the outset, urged that further impairment of its deficit operations was the crucial and basic issue. Of course, appellant requested the Commission to find that its service *would be* impaired, rather than a finding to the contrary. (e.g. R. 1248-9).

is but another way of saying that the grant of the certificate will not unduly prejudice the existing carriers. That contention, if tenable, would be equally true of *any* subordinate fact, and it would follow that the statutory conclusions, standing alone, would be sufficient. This, of course, is not the case.

Florida v. *United States*, supra;

United States v. *Pierce Auto Freight Lines*, *supra*, at p. 533.

Finally, contrary to the contention of appellees, the report's bare observation that appellant had contended that impairment would result, without comment, discussion, mention of the evidence, or determination of the question, does not constitute "weighing and considering" that crucial issue. If such scant mention satisfies the requirement, the requirement affords no protection from arbitrary or capricious decisions.

3. The District Court Misapplied The Law In Holding That There Was Substantial Evidence That Impairment Of Existing Service Would Not Result From The Authority Granted.

The facts supporting appellant's position on this question are contained in the Jurisdictional Statement, pages 17-19, and will not be here repeated.

Since the Commission did not discuss or determine the issue in its report, there is no way of knowing whether it considered the evidence to warrant a finding that existing service would not be unduly impaired. The Court below, however, has erroneously taken it upon itself to rule that there was substantial evidence to support such a finding *if one had been made*. (Jurisdictional Statement 14a).

It is clear from the face of its opinion that the Court below "misapprehended or grossly misapplied" the governing criteria of substantiality in reaching that conclusion.[1] The evidence which the Court listed as being "substantial" consisted exclusively of evidence that *at times* appellant's buses were crowded and not operated as vacantly as it claimed, and evidence that the proposed new service would create substantial traffic (Jurisdictional Statement, pages 13a-14a). That ruling was made in the face of the overwhelming evidence of deficit operations, 50% decline in traffic between the same points, curtailment of service between the points and inadequate *average* passenger loads, noted by the Court (Jurisdictional Statement, 13a), not to mention the crucial facts that all but a small portion of appellant's revenues are derived from traffic which will be opened to diversion by the proposed operation, and that *any* diversion would necessitate impairment of appellant's service. (R. 993). Wholly aside from the fact that the evidence found to be "substantial" consists of "suspicion, surmise, implications, or plainly incredible evidence", the ruling could only have resulted from failure to evaluate that evidence *in the light of the* overwhelming evidence which "fairly detracts from its weight", as required by the Administrative Procedure Act.

Title 5, U.S.C. Section 1009(e);

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[1] This is wholly apart from the error of appellees' assumption (Motion, page 8) that the doctrine of "primary responsibility" for the review of National Labor Relations Board decisions is equally applicable to review of Interstate Commerce Commission decisions, where the District Court review is not final, but is subject to direct appeal to the Supreme Court as a matter of right (28 U.S.C. Section 1253).

Universal Camera Corporation v. *National Labor Relations Board,* (1951), 340 U.S. 474, 484, 488.

The error is apparent from the opinion itself, even without reanvassing the record.

4. The District Court Erred In Holding That There Were (a) Adequate Findings and (b) Substantial Evidence To Authorize Service For Tulsa-Kansas City Passengers.

Title 49 U.S.C., Section 307(a), expressly limits the Commission's jurisdiction to grant certificates to "*the extent*" to which the proposed service is required by the public convenience and necessity.

In failing to note that *both the findings and the evidence* of need, even under the Court's own description of the proof,[1] related solely to the needs of several small intermediate points for *single-line* service to replace *two-line* service, and *not* to any need for any additional single-line service between the termini proper, over and above that provided by appellant, and in failing to hold that the Commission was, therefore, without statutory jurisdiction to issue a certificate authorizing such service, the Court clearly "misapprehended and grossly misapplied" the criteria governing the necessity for findings and evidence under Section 307(a).[2]

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[1] Jurisdictional Statement 4a-5a.

[2] Appellant's Petition for Reconsideration (R. 1243, 1246, 1248-9) strongly called the Commission's attention to the fact that it had not found and could not find, on the record before it, any inadequacy of service between the termini proper, and expressly prayed the Commission not to grant "authority to transport passengers between Kansas City and Tulsa". Intervening appellee's claim (Motion, page 13) that the issue was not raised before the Commission, does not accord with the facts.

CONCLUSION

There is a real and embarrassing conflict of opinion and authority among the various Courts charged with responsibility for enforcing and reviewing orders of the Interstate Commerce Commission with respect to these basic and important questions affecting the public interest, which recurrently arise under the Interstate Commerce Act. The principles followed by the Court below contravene long-settled principles of regulatory law, as pronounced by this Court, and, in effect render judicial review a mere mechanical formality.

For the reasons set out in this brief, appellant submits that the appeal presents substantial questions of law, and that the decision below is clearly erroneous.

The Motions to Affirm should be overruled.

Respectfully submitted,

JACK R. TURNEY, JR.
Attorney for Appellant.

Dated: April 17, 1956

Proof of Service

I, Jack R. Turney, Jr., attorney for Southern Kansas Greyhound Lines, Inc., appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 17th day of April 1956, I served copies of the foregoing Reply to Motions to Affirm on the several parties, as follows:

On the United States, by mailing 3 copies with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Kansas Trails, Inc., intervening defendant, by mailing copies in duly addressed envelopes with Air Mail postage prepaid to its attorneys of record as follows: J. William Townsend, Esquire, 204 Central Building, Topeka, Kansas; Oliver D. Rinehart, Esquire, Potts Building, Paola, Kansas; and John Mc. Call, Esquire, Chanute, Kansas.

JACK R. TURNEY, JR.

respondents.

MAY 7, 1956.

Decisions Per Curiam.

No. 721. SOUTHERN KANSAS GREYHOUND LINES, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Jack R. Turney, Jr.* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *J. Wm. Townsend* and *George F. Short* for Kansas Trails, Inc., appellees. Reported below: 134 F. Supp. 502.